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Zarcon, Inc. and Carpenters District Council of Kansas City & Vicinity. Cases 26–CA–20603 and 26–CA–20604

November 28, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On March 7, 2003, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and supporting argument. The Charging Party filed cross-exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs in response to the Respondent's exceptions.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified.

The Respondent did not except to the judge's findings that it violated Section 8(a)(1) of the Act. With respect to the 8(a)(3) violations found by the judge, we reject the Respondent's exceptions, for the reasons discussed in the judge's decision. The Charging Party's exceptions, in turn, challenge the judge's dismissal of the allegations that the Respondent unlawfully interrogated Michael Butts and Todd Bearden. As explained below, we find that the Respondent violated Section 8(a)(1) with respect to the Butts interrogation and find it unnecessary to pass on the Bearden interrogation.

On June 5, 2001, Butts and two other union members went to Zarcon's office and applied for work. After leaving, Butts called the Respondent's supervisor, Randy Lea Sr., and asked if Zarcon was hiring. Lea asked Butts where he had been working, and Butts replied that he was working at Artisan Construction Services, a union contractor where Lea had formerly been employed. Lea then asked, "You ain't carrying a [union] card no more?" Butts replied that he was, and that he was ready to go to

work. When Butts asked if Zarcon was hiring, Lea responded, "No. I've got a full boat right now."²

In evaluating whether an interrogation violates the Act, the Board examines whether, under the totality of the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), *affd.* sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). Lea, a supervisor and part owner of the Respondent, asked Butts whether he was carrying a union card, over the telephone, during Butts' job inquiry. See *Metta Electric*, 338 NLRB No. 161 (2003). Because Lea admitted that he considered Butts' to be a good carpenter, his question about a union card was clearly not relevant to Butts' ability, skill, productivity, and reliability as an employee. *Action Multi-Craft*, 337 NLRB 268, 277 (2001), citing *Culley Mechanical Co.*, 316 NLRB 26 (1995). That Lea's question was designed to interfere with Butts' chance of being hired is evident from Lea's admission that he used the information gained in his questioning as the basis for the unlawful failure to hire Butts. *Id.* Further, Lea's question to Butts was asked in the context of employer hostility and discrimination: the Respondent informed its employees that it would have union organizers removed from its jobsite by law enforcement officers; it informed them that an employee had been laid off because of his union activities; it threatened that the Company would close if the Union succeeded in organizing its employees, threatened representatives of the Union with physical violence if they did not cease engaging in activities protected by Section 7 of the Act; it laid off an employee because of his union activities, and refused to hire nine employee-applicants because of their affiliation with the Union. In these circumstances, we find that Lea's interrogation of Butts violated Section 8(a)(1).³

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 1.

"1. By informing its employees that it would have union organizers removed from the jobsite by law enforcement officers, informing its employees that an employee had been laid off because of his union activities, threatening that the Company would close if the Union succeeded in organizing its employees, interrogating

¹ The Charging Party moves that the Respondent's exceptions be stricken under the Board's Rules and Regulation, Sec. 102.46(b). We deny the motion because the Respondent's exceptions allege substantive errors by the judge and can be easily connected to particular portions of his decision, despite the fact that they do not specifically identify the parts of the judge's decision to which objection is made. *Dyns Hotel of Southfield*, 311 NLRB 856 fn. 2 (1993).

² Lea admitted, at the hearing, that the Respondent did, in fact, need carpenters at that time (indeed the Respondent hired a carpenter the next day and several others subsequently) and that he did not hire Butts and the other two applicants "because I could not hire Union people."

³ Because it would not affect the Order, we do not reach the issue of whether the Respondent unlawfully interrogated employee Bearden.

Mitchell Butts concerning his union membership, activities and sympathies, and threatening representatives of the Union with physical violence if they did not cease engaging in activities protected by Section 7 of the Act, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.”

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Zarcon, Inc., Springfield, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(g) and renumber the following paragraph accordingly.

“(g) Interrogating its employees regarding their union membership, sympathies, or activities.”

2. Substitute the attached notice to employees for that of the administrative law judge.

Dated, Washington, D.C. November 28, 2003

Robert J. Battista,	Chairman
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Wilma B. Liebman,	Member
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Peter C. Schaumber,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire employee applicants because they are members of Carpenters Local 978, any local union affiliated with Carpenters District Council of Kansas City & Vicinity, or any other labor organization.

WE WILL NOT lay off employees because of their union membership and activities.

WE WILL NOT inform employees that we will have union organizers removed from our jobsites by law enforcement officers.

WE WILL NOT inform our employees that another employee has been laid off because of his union activities.

WE WILL NOT threaten that the Company will close if the Union succeeds in organizing our employees.

WE WILL NOT threaten representatives of the Union with physical violence if they do not cease engaging in activities protected by Section 7 of the Act.

WE WILL NOT interrogate our employees regarding their Union membership, sympathies, or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Kelly Hall, Mitchell Butts, Larry Cadle, Stanley Campbell, Robert Teitel, Donald Clemens, Arthur Kessler, Stephan Hutton, and Rebecca Ellison reinstatement to the positions for which they applied, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if we had not discriminated against them.

WE WILL make the above-named discriminatees whole for any loss of pay and benefits they may have suffered as a result of the discrimination against them, to be computed in the manner set forth in the remedy section of the judge's decision.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to hire the above-named discriminatees and, within 3 days thereafter notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, offer Eric Berner full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Eric Berner whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the discharge of Eric Berner, and WE WILL, within 3 days thereafter, notify him in writing that his discharge will not be used against him in any way.

ZARCON, INC.

Melvin L. Ford and Ruth Small, on brief, Esq., for the General Counsel.

Charles F. Kiefer Jr., Esq., for the Respondent.

Michael J. Stapp, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge: This case was tried in Springfield, Missouri, on December 16, 17, and 18, 2002. The charge in Case 26–CA–20603 was filed on October 13, 2000, and was amended on December 15, 2000. The charge in Case 26–CA–20604 was filed on July 23, 2001.¹ The complaint issued on August 30, 2002. The complaint alleges several violations of Section 8(a)(1) of the National Labor Relations Act, and the layoff of one employee and refusal to consider for hire or to hire eight employees in violation of Section 8(a)(3) of the Act. At the hearing I permitted an amendment alleging a refusal to consider for hire or to hire one additional employee. The Respondent's answer denies any violation of the Act. I find that the Respondent did violate Section 8(a)(1) and (3) of the Act substantially as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Zarcon, Inc., the Company, is a corporation engaged in the construction industry at various sites in and near Springfield, Missouri. The Company annually purchases and receives goods valued in excess of \$50,000 from other enterprises located in the State of Missouri, each of which other enterprises received those goods directly from points outside the State of Missouri. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Carpenters District Council of Kansas City & Vicinity, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

¹ The charges were filed in Region 17. Case 26–CA–20603 was formerly Case 17–CA–20889 and Case 26–CA–20604 was formerly Case 17–CA–21289. All dates are in 2000 unless otherwise indicated.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Overview

The Company began operating in 1995. President David Moulin, Floyd Myer, Larry Fry, Sr., Jeff Sandridge, and Randy Lea, Sr., were stockholders. All of the stockholders actively worked for the corporation. Myer was the estimator. Fry, Sandridge, and Lea were supervisors. The record does not establish the extent of the holdings of the foregoing individuals; however, President Moulin controlled the corporation. Moulin had formerly had some ownership interest in Artisan Construction Services, a union construction company at which both Fry and Lea had worked. When Lea came to Zarcon, Moulin told him that he had one request, "Don't ever try to organize me." Lea promised that he would not, and he kept his word.

The Respondent's answer pleads that it has recognized the Congress of Independent Unions and that it "can only recognize" that Union. The issue in this case is discrimination, not recognition. Discrimination with regard to the hire and tenure of employment of employees because of the employer's preference for one union over another is the "most rudimentary kind of discrimination covered by Section 8(a)(1) and (3) of the Act." *Long Transportation Co.*, 191 NLRB 202, 205 (1971). The Congress of Independent Unions is not affiliated with the AFL–CIO. Notwithstanding the assertion in the Respondent's answer regarding recognition of the Congress of Independent Unions, President Moulin considered the Company to be non-union. He explained to former Administrative Assistant/Office Manager Allyson Deubel-Rowe that the Company "did not have Union employees. We [the Company] were members of the Congress of Independent Unions." In October 1999, Arthur (Art) Kessler, an Organizer with the Union, spoke with Supervisor Randy Fry, Sr., at a jobsite. Fry stated that he hated the Union and that the Company would "never sign a Union agreement with the Carpenters Local."

Prior to April 11, 2001, when an applicant contacted the Company seeking work, former Administrative Assistant/Office Manager Deubel-Rowe would write down the applicant's name and telephone number, the applicant's craft, and a brief note of the applicant's experience. She would then put the paper in the box of the appropriate supervisor. At all relevant times prior to August 2001, when Lea's employment ceased, Lea hired carpenters and Fry hired employees with experience hanging acoustical ceilings. If an applicant had experience in both areas, Deubel-Rowe would make a copy of her notes and give the information to both supervisors.

This "salting" case is unusual in that there is virtually no dispute regarding the facts. Supervisor Fry and former Administrative Assistant/Office Manager Deubel-Rowe were called by the General Counsel in the presentation of his case. Former supervisor and stockholder Randy Lea, Sr., was called by the Charging Party. On the third day of the hearing, the Respondent rested without presenting any witnesses. Supervisor Fry testified that he did not care whether employees were in the Union "as long as they give me a full day's work." I do not credit that testimony which, as already noted, was specifically contra-

dicted by Lea and Deubel-Rowe. It is also contrary to Fry's uncontradicted statement to Organizer Kessler.

2. The events in 2000

In late May, Union Organizer Kessler requested Eric Berner to apply for work with Zarcon without revealing his union affiliation. He did so and was hired on May 26. Kessler made the same request of Todd Bearden, who had recently come from St. Louis. Bearden was hired on June 1.

On June 5, Kelly Hall, Mitchell (Mitch) Butts, and Larry Cadle went together to the Zarcon office. Butts and Cadle were wearing union hats. Hall was wearing an Artisan Construction Services hat. As noted above, Artisan was a local contractor that was unionized. In the course of the conversation at the Zarcon office, Butts informed Deubel-Rowe that he had been a member of the Union for 12 years. Deubel-Rowe informed Butts that Zarcon was a nonunion shop and asked if that would be a problem. Butts replied that it would not. Each of the employees gave Deubel-Rowe their names, telephone numbers, and years of experience. Thereafter, Hall and Butts called Randy Lea, Sr., whom they knew from working at Artisan. In the course of the conversation between Butts and Lea, Lea questioned Butts, asking "You ain't carrying a card no more?" Butts replied that he was and that he was ready to go to work. Lea informed both of the employees that he would give them a call if any work came up. He did not do so. At the hearing, Lea acknowledged that he knew Hall, Butts, and Cadle, that all three were good carpenters, that the Company was in need of carpenters, that he took their telephone numbers but did not call them "Because I could not hire Union people." Lea further acknowledged that he falsely told Hall that he had a "full boat," whereas he could have used him, but "he was a union person."

Thereafter, Organizer Kessler requested Jimmy Mitchell, who had recently come to the Carpenters Local from Texas, Richard (Rick) Lehmann and Joe San Paolo to apply for work with Zarcon. They did, and all were hired on or about June 26. Thereafter, Mitchell worked until October 27, Lehmann worked until November 3, and San Paolo worked until November 10.

In addition to the foregoing hires, on June 6, the Company hired employee Jack Sessions who, although having worked as a carpenter in California, had for the past five years been the manager of a Pizza Hut in Springfield. Sessions worked until November 17 and was rehired on June 6, 2001. On June 23, the Company hired Michael Sams. Sams worked for only two weeks.

In late June and early July, Berner, Bearden, Mitchell, Lehmann, and San Paolo were all working at the American Freightways jobsite in Harrison, Arkansas. Supervisor Lea was informed by Supervisor Fry that there was organizational activity at that jobsite. Lea understood that Fry's information came from his son, Larry Fry, Jr., and recalled that Fry, Sr., mentioned the names of Berner and Al Berry and "I think Todd Bearden." Berry had previously been sent from the American Freightways jobsite by Foreman John Holt following a personal dispute. Berry later reported to Bearden that he understood the report of union activity had originated with employee Corey Hudson and that Hudson had identified only Berner. Regardless

of who was included in the initial rumor, Lea confirms that Fry asked him to "take care of it." On June 22, Lea spoke with Berner, noting that he liked to be "straight with people, and he liked people to be straight with him." He informed Berner that union organizers might try to sell him on the benefits of the Union, that the Union was "trying to salt and organize companies," that President Moulin had a "lot of money" and "if that happened, they would have a table full of attorneys, and he [Moulin] would shut down and reopen the next day, under a new name." Some days after this, Lea addressed all of the employees and stated that Zarcon was a nonunion company. Lea testified that, upon going to the jobsite, "it didn't take long to see" that Berner was involved in Union activity. Lea made no such statement regarding Berry or Bearden.

Berner had solicited Berry to sign a union authorization card, but there is no evidence that the Company was aware that Berry had signed. There is no evidence that Bearden engaged in any union activity. There is no evidence of further rumors of union activity at the American Freightways jobsite after Lea spoke to the employees. Lea testified that he "reluctantly" laid off Berner at Supervisor Fry's insistence because of his union activities on July 26. About a week after this, Berner spoke with Berry who informed him that "he spoke with Randy Lea, and Randy told him that I was laid off because I was affiliated with the Union in some way, and that I was speaking with Art Kessler." In September, when Berry was in charge at the Pet Warehouse jobsite, he confided to Bearden that Berner was terminated because "Randy [Lea] found out that he [Berner] was Union." Berry went on to note that Lea had told Berner that he was being let go "because they were running out of work." Lea did not deny telling Berry that Berner had been terminated because of the Union. Lea acknowledged that he spoke with Foreman John Holt regarding the Union and Berner. When asked whether he had specifically informed Holt that Berner had been terminated because of his union activities, Lea answered, "I don't know if I actually just come out and said it to John [Holt] or not, but John knew." Regardless of the specific words that Lea used, his conclusion that Holt knew that he had terminated Berner because of the Union is confirmed by the testimony of Rick Lehmann who overheard Holt tell another employee, whose first name was Steve, that "Eric [Berner] was let go because he was spying for the Union."

When Bearden was hired he was initially assigned to work under Supervisor Ken Sandridge at a Staples store. While working on that job, he had several conversations with Sandridge including one in which he commented that he had come from St. Louis. Sandridge asked what Bearden thought about the Union and then continued, noting that Organizer Art Kessler came around to the Company's jobsites and "harasses the men." Sandridge noted that he could not hit Kessler but that he could call law enforcement officials and have the officers remove Kessler from the jobsite.

After working at the American Freightways jobsite, Bearden was assigned to the Millennium Investments jobsite and then to the Battlefield Mall jobsite. On July 18, at the Battlefield Mall jobsite, Kessler approached Bearden, pretending not to know him, and gave him a card containing information about union wages and benefits. Thereafter, Bearden informed Supervisor

Lea that Kessler had given him the card, and Lea suggested that he throw it in the trash. Lea continued talking, explaining that Kessler was trying to get the employees to vote the Union in at the Company but that “wouldn’t ever happen ... [because] Dave Moulin had deep pockets and that he would close the door and open up the next morning under a new name.”

Thereafter, Bearden returned to the Millennium jobsite where work was being directed by Foreman Rick Merritt. Kessler visited that jobsite in September. Merritt approached Kessler. Bearden heard him tell Kessler that he “needed to leave and get off the job, or he was going to start throwing rocks at him.” Thereafter, Merritt commented, “Guys like that should be taken out and shot.”

The following day, Merritt referred to having run Kessler off of the jobsite and stated, “if the Union got in” that “they would shut the doors and open under a new name.”

3. The applications of April 11, 2001

On April 11, Organizer Art Kessler went with Stanley Campbell, Robert Teitel, Donald Clemens, and Stephan Hutton to Zarcon’s office. All were wearing insignia reflecting their affiliation with the Carpenters Union. Dubel-Rowe knew who Kessler was. She took their names, telephone numbers, and experience. Each stated that he had experience in metal studs, drywall, and acoustical ceilings. Kessler had 22 years experience, Campbell had 34 years experience, Teitel had 27, Clemens had 23, and Hutton had 7 years experience. Hutton was the last of the group to state his experience. When he said 7 years, Dubel-Rowe responded, “You’re the pup,” and everyone laughed. Dubel-Rowe reported the group applications to Fry who stated that he “did not intend to hire the Union applicants.”

Deubel-Rowe saved the handwritten notes that she made of these applicants’ names, telephone numbers and experience. She also typed up a sheet listing the five. Shortly after this, Deubel-Rowe approached President Moulin and stated that she thought it would be a good idea to get “normal applications . . . and keep them on file, just to cover their butts . . .” The Company did so. There was no policy regarding when an application became inactive. In early December 2002, some two weeks before this hearing, the Company obtained revised applications and adopted a policy of maintaining applications in an active status for 30 days.

Lea was familiar with Kessler and Campbell and knew that both were good carpenters. He testified that all five applicants were qualified and that Zarcon was in need of carpenters. When asked whether he did not call those individual because he would lose his job if he hired Union people, Lea answered, “if I did, yes, I would.” The first carpenter that Lea recalled hiring after April 11, 2001, was Jack Sessions, the former Pizza Hut manager who had worked for the Company in the year 2000. Sessions was hired on June 6. Thereafter, Lea’s daughter was hospitalized and he “didn’t hire any more people” during that time. Lea placed that time as “toward the end of June.” Thereafter, Lea acknowledges hiring Robbie and Ronnie Gay, Scott Hass, and Corey Hudson, who were hired on July 10. Company records show that employee Mike Rikard was hired on June 10, Ryan Reynolds was hired on June 16, and Brian Wilson was hired on June 25, 2001. All are shown as holding the position

of “wallboard installation,” the position for which carpenters were hired. Lea was not questioned regarding those individuals.

4. The application of Rebecca (Becky) Ellison

At the hearing, Administrative Assistant/Office Manager Dubel-Rowe was questioned regarding the application of Becky Ellison who had applied for work on August 22, 2001. Ellison’s application reflects over a year of experience working through Carpenter’s Local 978, the local in the Springfield, Missouri, area and eight years of experience working through Carpenter’s Local 613. Her application also reflects four years of experience with the United States Navy, a total of 13 years experience. When Deubel-Rowe informed Supervisor Fry of the application, she recalls he stated that he “didn’t believe she had enough experience to be able to do the job” and that he “thought she was Union and wasn’t going to hire her.” On August 30, 2001, a week and a day after Ellison applied, the Company’s payroll records reflect that four employees were hired for wallboard installation: Cary McAdams, Eric Olliverson, Michael Ritschel, and Daniel Redding. The Company’s payroll records reflect that all four shared the birth date of “1/1/1940.” Assuming the accuracy to those entries, the records do not reflect the work experience reported by those four 62-year-old applicants.

B. Analysis and Concluding Findings

1. The 8(a)(1) allegations

The complaint, in subparagraph 5(a), alleges that Supervisor Lea unlawfully interrogated employees on June 8 and June 22 and that Supervisor Sandridge unlawfully interrogated employees on June 9. The only evidence relating to any interrogation by Supervisor Lea is the testimony of Butts that, in the telephone conversation that he had with Lea on June 5, Lea asked if he was still carrying a union card. Butts knew Lea from working at Artisan, a unionized employer. Shortly before this telephone call, Butts had worn a union hat to the Zarcon office and specifically informed Dubel-Rowe that he had been a member of the Union since 1991. I find no coercion in this circumstance where Butts had, virtually contemporaneously, shown his continuing union affiliation by his clothing and affirmative statement. During the second week of June, at the Staples jobsite, Supervisor Sandridge asked employee Bearden what he thought of the Union and, without waiting for a reply, referred to Organizer Kessler coming onto the jobsite. Sandridge stated his intention to call law enforcement officers when this occurred. So far as the record shows, Bearden did not speak. As hereinafter discussed, Sandridge’s comment regarding calling law officers did violate the Act. Although asking Bearden what he thought of the Union, Sandridge kept talking. He did not seek a response to the question and Bearden made none. Bearden’s testimony reflects that Sandridge’s remarks were intended to apprise this recently hired employee that he should have nothing to do with Organizer Kessler or the Union. Bearden’s testimony does not establish a coercive interrogation. I shall recommend that all allegations relating to interrogation be dismissed.

Subparagraph 5(b) of the complaint alleges that Sandridge threatened “to call the police on Union organizers.” Sandridge’s

stated intention to call law enforcement officers if Organizer Kessler came onto the jobsite implicitly suggested that Bearden should avoid organizers and explicitly informed him that the Respondent would not permit the Union to have access to its employees. Board precedent is clear that, when dealing with access of nonemployee union organizers, "there is a threshold burden on the respondent to establish that it had ... an interest which entitled it to exclude individuals from the property." *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), enf'd. 187 F.3d 1080 (9th Cir. 1999). A respondent's threat to have law officers arrest nonemployee union representatives at a jobsite violates the Act unless the respondent establishes that it has a property interest in its jobsites which entitle it to exclude individuals from the property." *R & R Plaster & Drywall Co.*, 330 NLRB 87, 88 (1999). The Respondent presented no evidence establishing the nature or extent of its property interest at the Staples jobsite. By informing its employees that it would have union organizers removed from the jobsite by law enforcement officers, the Respondent violated Section 8(a)(1) of the Act.

Subparagraph 5(c) of the complaint alleges that the Respondent informed its employees that other employees were discharged because of their union membership or activities. In subparagraph 5(g), it alleges that the Respondent informed employees that they had been laid off because of their Union activities. The allegations of subparagraph 5(c) are attributed to Foreman John Holt, who was overheard by employee Lehmann telling an employee identified as Steve that Berner was "let go because he was spying for the Union," and to Foreman Al Berry at the Pet Warehouse jobsite, who told Bearden that Berner was laid off because "Randy [Lea] found out that he was Union." The allegation of subparagraph 5(g) relates to Berry's admission to Berner that Berry had spoken with Lea and that "Randy [Lea] told him that I was laid off because I was affiliated with the Union." The Respondent's answer denies that Holt and Berry are supervisors. Supervisor Lea acknowledged speaking about Berner and the Union with Holt, that he did not know if he "actually just [came] out and said it [that Berner was laid off because of the Union] to John [Holt] or not, but John knew." Thus, Holt's supervisory status is not relevant. If Holt was not a supervisor, the Respondent violated Section 8(a)(1) by Lea's informing Holt either implicitly or explicitly that Berner had been laid off because of his union activities. If Holt was a supervisor, the Respondent violated Section 8(a)(1) by Holt's statement. Berry was in charge of the Pet Warehouse jobsite when he spoke with Bearden. Insofar as his statement to Bearden was consistent with the Respondent's policies as confirmed by Lea's admission that he laid off Berner because of his union activities, Berry's statement was made in his capacity as an agent. Although Berry's report to Berner was true, the record does not establish Berry's position at that time. If Berry were an employee, Lea's statement to him would violate Section 8(a)(1). Insofar as Berry was an agent when he spoke with Bearden, any finding regarding Berry's conversation with Bearden would be cumulative. The Respondent, by informing employees that an employee had been laid off because of his union activities, violated Section 8(a)(1) of the Act.

Subparagraph 5(d) of the complaint alleges threats of closure by Supervisor Lea on June 21 and July 18 and by Foreman

Rick Merritt on September 29. Employee Eric Berner testified that, at the American Freightways jobsite on June 21, when Lea spoke with him individually, Lea explained that the Union was seeking to organize and Moulin had a "lot of money" and "if that happened, they would have a table full of attorneys, and he [Moulin] would shut down and reopen the next day, under a new name." Employee Todd Bearden testified that Lea made a similar comment to him at the Battlefield Mall jobsite on July 18 and that Foreman Merritt, at the Millennium jobsite, stated that "if the Union got in" that "they would shut the doors and open under a new name." Lea did not deny either conversation. Merritt did not testify. The Respondent's answer denies that Merritt was a supervisor. The record is insufficient to establish whether Merritt was a supervisor; however, it does establish that he was an agent in that he excluded persons from the jobsite on behalf of the Respondent. His repetition of the threat of closure is consistent with the statements of Supervisor Lea. By threatening that the Company would close if the Union succeeded in organizing its employees, the Respondent violated Section 8(a)(1) of the Act.

Subparagraph 5(e) of the complaint alleges that Foreman Merritt threatened union representatives with physical harm because they attempted to discuss the Union with employees and subparagraph 5(f) alleges that he "[p]rohibit[ed] union representatives from its project" Bearden's credible testimony establishes that, in late September at the Millennium jobsite, Merritt told Kessler that he "needed to leave and get off the job, or he was going to start throwing rocks at him." Merritt's status as a supervisor is immaterial with regard to this allegation since he was in charge of the jobsite and, in directing Kessler to leave, was acting as the Respondent's agent. See *Ramey Supermarkets*, 321 NLRB 432, 435 (1996). The Respondent presented no evidence establishing that it had "an interest which entitled it to exclude individuals from the property." *Indio Grocery Outlet*, supra. I find that the prohibition from its project is encompassed by the threat to throw rocks at Kessler if he remained. The foregoing statement threatened physical violence against him if he did not leave and, in so doing, the Respondent violated Section 8(a)(1) of the Act.

The complaint, in subparagraph 5(e), alleges that Supervisor Lea directed employees to throw away union authorization cards. Kessler approached Bearden, pretending not to know him, and gave him a card containing information about union wages and benefits. Thereafter, Bearden informed Supervisor Lea that Kessler had given him the card. Bearden did not recall that Lea had suggested that he throw the card in the trash until counsel specifically asked if Lea "had a suggestion as to what you could do with that card." Bearden did not testify to the words Lea used that he interpreted as a suggestion. The card was not a union authorization card. If Lea had directed Bearden to throw the information card in the trash, I am certain that he would have so testified. Referring to union literature as trash does not violate the Act. *Arrow-Hart, Inc.*, 203 NLRB 404 (1973). There is no evidence that Lea "directed" Bearden to "throw away union authorization cards." I shall recommend that this allegation be dismissed.

2. The layoff of Eric Berner

The testimony of Berner and admissions of Supervisor Lea establish that Berner engaged in union activity, that the Respondent suspected him of having engaged in union activity and that Lea confirmed these suspicions, that the Respondent bore animus towards union activity and that Berner's union activities were the motivating factor for his layoff. Thus, all of the criteria set out in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), were established by the General Counsel. In its brief, the Respondent argues that no inference of unlawful action regarding Berner should be drawn because neither Berry nor Bearden, who were also identified in the initial rumors relating to union activity, were laid off. This argument ignores the testimony of Lea that, upon going to the American Freightways site, he confirmed that Berner was engaging in union activities. Lea was not questioned regarding what, if anything, he learned regarding the rumored activities of Bearden and Berry. There is no evidence that Bearden engaged in any union activities, and there is no evidence that the Respondent ever became aware that Berry had signed a union authorization card. The Respondent presented no evidence rebutting the General Counsel's prima facie case that Berner was laid off because of his union activity. The Respondent, by laying off Eric Berner because of his union activity violated Section 8(a)(3) of the Act.

3. The refusals to consider or to hire

a. The applications of June 5, 2000, and August 22, 2001

The Board, in *FES*, 331 NLRB 9 (2000), sets out the elements necessary to establish an unlawful refusal to hire as follows:

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Id. at 12. [Footnotes omitted.]

Regarding the first criterion, the Board notes that its analysis “presupposes that there were appropriate openings in the employer's work force.” Ibid. Thus, evidence sufficient to establish a prima facie case of refusal to hire requires the existence of a position that the applicant could have filled. In the instant case, the testimony of Lea that he needed carpenters and that he took the telephone numbers of the three alleged discriminatees who applied on June 5, but did not call them “[b]ecause I could not hire Union people,” coupled with the hire of Sessions, Sams, and covert applicants Jimmy Mitchell, Rick Lehmann

and Joe San Paolo establishes the existence positions for all three of the alleged discriminatees who applied on June 5, 2000.

The hire of four employees within eight days of Ellison's application confirms the existence of a position for her at the time of her application.

The second criterion of *FES* relates to qualifications. The work histories Hall, Butts, and Cadle together with Lea's testimony establishes that they were fully qualified. Ellison had 13 total years of experience with 9 years being through two Carpenters Union locals. I find that she was fully qualified.

Regarding the third criterion, that antiunion animus contributed to the decision not to hire the applicants, Lea's testimony establishes that he did not call Kelly, Butts, or Cadle “[b]ecause I could not hire Union people.” Fry, upon reviewing Ellison's application stated that he “didn't believe she had enough experience” and that he “thought she was Union and wasn't going to hire her.” The foregoing statement establishes that Ellison's union affiliation contributed to the decision not to hire her.

I find that General Counsel established a prima facie case with regard to these alleged discriminatees.

Under the criteria set out in *FES*, if the General Counsel establishes a prima facie case and the respondent “fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation,” a violation of Section 8(a)(3) of the Act is established. In its brief, the Respondent notes the testimony of Fry that he did not care whether employees were union or not. I have not credited that testimony. The Respondent presented no evidence relating to any of its hiring decisions. Fry did not testify regarding any basis for questioning Ellison's qualifications or experience. The Respondent failed to rebut the General Counsel's prima facie case. I find that the Respondent violated Section 8(a)(3) of the Act by refusing to hire Hall, Butts, Cadle, and Ellison.

b. The applications of April 11, 2001

The General Counsel and Charging Party seek an instatement and backpay remedy for the five applicants of April 11, 2001. The Respondent argues that there was no violation of the Act because there were no positions available on April 11, 2001, and that by the time hiring did occur, in June and July, these applicants would “have been at the bottom of his [Lea's] application call list.”

In *FES*, the Board held that, to establish a refusal to consider violation the General Counsel must show “(1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.” Id. at 15. In further discussion regarding a respondent's refusal to consider applicants because of their union affiliation, the Board stated:

When a job opening follows on the heels of a refusal to consider an applicant for positions of that kind, the question whether the applicant would have been offered that job had he been given nondiscriminatory consideration at the outset is a remedial issue appropriately determined in the compliance stage of the refusal-to-consider violation. As discussed above, one significant consequence of a discriminatory refusal-to-consider violation is the discriminatory denial of access to the pool of applicants for future openings. Because the fundamen-

tal purpose of Board remedies is to “undo the effects of [the] violations of the Act,” *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953), it is appropriate to consider in compliance whether, had the applicant entered the pool at the time of application, he or she would have been hired for a job that subsequently opened up. *FES*, supra at 16.

Although the foregoing language would appear to be applicable to the instant case in which hiring occurred only a few weeks after the applications, further language in *FES* directs that “matters that can be litigated at the unfair labor practice stage, must be litigated at that stage and cannot be deferred to compliance.” *Id.* at 17. Assuming the latter language is operative, I cannot conceive of any situation in which there would be a job opening that followed “on the heels of a refusal to consider” that should not be litigated at the unfair labor practice hearing since it would have occurred prior to the hearing and would be known to the General Counsel.

Insofar as the General Counsel is obligated to litigate all openings of which he is aware that have occurred prior to the hearing, I must conclude that openings occurring at any time after the alleged discriminatees applied would constitute “appropriate openings in the employer’s work force available to the applicant.” This conclusion is confirmed by the Board’s statement in *3D Enterprises Contracting Corp.*, 334 NLRB 57 (2001), that “the General Counsel must also litigate the question of whether the discriminatees would have been hired for any such subsequent openings in the absence of the discriminatory refusal to consider them.” Thus, it would appear the first criterion of a refusal to hire violation, a showing that “the respondent was hiring . . . at the time of the alleged unlawful conduct,” need not be contemporaneous with the alleged discriminatee’s application.

Lea testified that Zarcon was in need of carpenters at the time these employees applied on April 11, 2001. That testimony is uncontradicted. The absence of the hire of any carpenter until former employee Sessions was hired on June 6, 2001, and the hire of additional carpenters in June and July does not contradict Lea’s testimony, nor does it establish that the Respondent did not need carpenters. It establishes only that the Respondent did not hire carpenters immediately following the applications of the union affiliated carpenters.

Even if I did not to credit Lea’s testimony, the hire of former employee Sessions on June 6, 2001, and additional carpenters later in June and in early July, establishes that, although not contemporaneous with the employees’ applications, there were “appropriate openings” for the applicants.

The testimony of the five April 11, 2001, applicants confirm that they were qualified. The least qualified of the five was Stephan Hutton who had 7 years experience. Lea was familiar with Kessler and Campbell and considered them to be good carpenters. Lea, who made the hiring decisions regarding carpenters, testified that all five applicants were qualified.

Regarding the third criterion of a refusal-to-hire violation, Lea’s testimony that he “could not hire Union people” confirms, in the words of the Board, “that antiunion animus contributed to the decision not to hire the applicants.” When asked whether he did not call those individuals who applied on April 11, 2001,

because he would lose his job if he hired union people, Lea answered, “if I did, yes, I would.” The General Counsel established a prima facie case that the five applicants were not offered employment because of their union affiliation.

The only document placed in evidence by the Respondent was Respondent’s Exhibit. 1, which shows the names, date of hire, and date of termination of employees during the relevant period. The Respondent had no formal application process until some point after April 11, 2001. Prior to that, the Respondent’s only records of applicants were Deubel-Rowe’s notes that were given to the respective supervisors. The record does not establish when, after April 11, pursuant to Deubel-Rowe’s suggestion, the Respondent began taking formal applications. There is no evidence reflecting the date of application or the identity of any applicants for carpenter positions from April 11, 2001, until Ellison applied on August 22, 2001. The Respondent presented no testimonial or documentary evidence refuting Lea’s testimony that, on April 11, 2001, Zarcon was in need of carpenters by establishing the date or dates that it contends that positions became available.

The Respondent argues that, at the point that hiring actually occurred after April 11, 2001, the five applicants, would “have been at the bottom of his [Lea’s] application call list.” The Respondent cites no evidence in support of this argument for the simple reason that there is no such evidence. The Respondent presented no evidence contradicting Lea’s testimony that Zarcon was in need of carpenters on April 11, 2001, when the applicants would have been at the top of Lea’s list. Even assuming that the positions that the Respondent thereafter filled did not become available until after April 11, the Respondent presented no evidence that the alleged discriminatees were not the most recent applicants for those position at the time that they became available.

Thus, even if I were to assume, contrary to Lea’s testimony, that no positions were available on April 11, 2001, the hire of Sessions on June 6, Mike Rikard on June 10, Ryan Reynolds on June 16, Brian Wilson on June 25, Rodney and Ronnie Gay, Scott Hass, and Corey Hudson, on July 10, establishes that positions did become available prior to those dates of hire. Giving the Respondent every benefit of any doubt that can be inferred from the record in this case, there is no evidence that the union applicants of April 11, 2001, were not the most recent applicants for those positions at the time those positions became available. In view of the overwhelming evidence corroborating Lea’s testimony that the Respondent would not hire “union people,” the hire of applicants other than the alleged discriminatees in June and July establishes nothing other than that the Respondent waited until applicants who were not affiliated with the Union applied to fill the positions. The Respondent has not rebutted the General Counsel’s prima facie case.

The Respondent, by refusing to hire Stanley Campbell, Robert Teitel, Donald Clemens, Art Kessler, and Stephan Hutton, because of their union affiliation, violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. By informing its employees that it would have union organizers removed from the jobsite by law enforcement officers,

informing its employees that an employee had been laid off because of his union activities, threatening that the Company would close if the Union succeeded in organizing its employees, and threatening representatives of the Union physical violence if they did not cease engaging in activities protected by Section 7 of the Act, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By laying off Eric Berner because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By refusing to hire the nine employee-applicants named in subparagraph 2(d) of the recommended order, because of their affiliation with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off Eric Berner, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of layoff to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent, having unlawfully refused to hire Kelly Hall, Mitchell Butts, and Larry Cadle, who applied on June 5, 2000; Stanley Campbell, Robert Teitel, Donald Clemens, Arthur Kessler, and Stephan Hutton, who applied on April 12, 2001; and Rebecca Ellison, who applied on August 22, 2001; it must offer them reinstatement and make them whole for any loss of earnings or other benefits they may have suffered as a result of the discrimination practiced against them from the date that they would have commenced working for the Respondent, which I find to be the date following their respective applications, to the date that their employment would have ended, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra. The amounts due to the discriminatees, if anything, shall be determined at a compliance hearing taking into account amounts they would have received on other jobs to which the Respondent would later have assigned them. *Dean General Contractors*, 285 NLRB 573 (1987).²

Insofar as the work at the jobsites involved in this proceeding has been completed, Respondent must mail a copy of the Notice to all former employees who were working for the Respondent on June 5, 2000, and all former employees who

worked for the Respondent at any time thereafter. *Jo-Del, Inc.*, 326 NLRB 296 at fn. 4 (1998).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Zarcon, Inc., Springfield, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Refusing to hire employee applicants because they are members of Carpenters Local 978, any local union affiliated with Carpenters District Council of Kansas City & Vicinity, or any other labor organization.

(b) Laying off employees because of their union membership and activities.

(c) Informing employees that it would have union organizers removed from jobsites by law enforcement officers.

(d) Informing employees that an employee had been laid off because of his union activities.

(e) Threatening closure if the Union succeeded in organizing the Company's employees.

(f) Threatening representatives of the Union physical violence if they did not cease engaging in activities protected by Section 7 of the Act.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Eric Berner full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Eric Berner whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff, and within 3 days thereafter, notify Eric Berner in writing that this has been done and that the layoff will not be used against him in any way.

(d) Within 14 days from the date of this Order, offer Kelly Hall, Mitchell Butts, Larry Cadle, Stanley Campbell, Robert Teitel, Donald Clemens, Arthur Kessler, Stephan Hutton, and Rebecca Ellison reinstatement to the positions for which they applied, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if the Respondent had not discriminated against them.

(e) Make the above-named discriminatees whole for any loss of pay and benefits they may have suffered as a result of the

² Although all employees hired in May and June 2000 ceased working by the end of that year, the testimony of Bearden confirms that the employees were moved from job to job in the Springfield area

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

discrimination against them, to be computed in the manner set forth in the remedy section of this decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire the above-named discriminatees and, within 3 days thereafter notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

(g) Within 14 days from the date of this Order, notify the above-named discriminatees in writing that any future job application will be considered in a nondiscriminatory way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of back-pay due under the terms of this Order.

(i) Mail to all former employees employed by the Respondent at any time on or after June 6, 2000, and post at its office and jobsites in and around Springfield, Missouri, copies of the attached notice marked "Appendix."⁴ Such notice shall be mailed to the last known address of each former employee. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be mailed within 14 days after service by the Region and shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 7, 2003

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire employee applicants because they are members of Carpenters Local 978, any local union affiliated with Carpenters District Council of Kansas City & Vicinity, or any other labor organization.

WE WILL, within 14 days from the date of the Board's Order, offer Kelly Hall, Mitchell Butts, Larry Cadle, Stanley Campbell, Robert Teitel, Donald Clemens, Arthur Kessler, Stephan Hutton, and Rebecca Ellison reinstatement to the positions for which they applied, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if the Respondent had not discriminated against them.

WE WILL make the above-named discriminatees whole for any loss of pay and benefits they may have suffered as a result of the discrimination against them, to be computed in the manner set forth in the remedy section of this decision.

WE WILL NOT lay off employees because of their union membership and activities.

WE WILL, within 14 days from the date of the Board's Order, offer Eric Berner full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Eric Berner whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

WE WILL NOT inform employees that we will have union organizers removed from our jobsites by law enforcement officers.

WE WILL NOT inform our employees that another employee has been laid off because of his union activities.

WE WILL NOT threaten that the Company will close if the Union succeeds in organizing our employees.

WE WILL NOT threaten representatives of the Union physical violence if they do not cease engaging in activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by

ZARCON, INC.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."